IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-55

CENTRAL BANK,
A Wisconsin Banking Corporation,

Petitioner,

vs.

JAMES E. SMITH, Comptroller of the Currency of the United States, FRANK J. BAUER, WILLIAM GRAVITTER, HENRY KARBINGER, JR., CHRIST KRANTZ, DAVID A. ULRICH, HENRY NAGY, RAYMOND J. PERRY, GERALD J. SCHAEFER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND REASONS RELIED ON IN SUPPORT THEREOF.

LAWRENCE G. WICKERT

HAROLD H. FUHRMAN

JOHN P. ROEMER

4455 West Bradley Road
Milwaukee, Wisconsin 53223

Attorneys for Petitioner

OF COUNSEL:

WICKERT & FUHRMAN
4455 West Bradley Road
Milwaukee, Wisconsin 53223

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TO: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

CENTRAL BANK, a Wisconsin Banking Corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on March 17, 1976.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported in 398 F Supp. 1403, and printed in Appendix B hereto at page 113.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 532 F (2) 37, and printed in Appendix B hereto at page 107.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 17, 1976. Re-hearing was denied April 23, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I.

In granting approval to organize the proposed Tri City National Bank of West Allis, did the failure of the Comptroller to make a contemporaneous explanation of the determinative reasons for his action and to discuss or indicate that he considered the "branch bank" issue to which his senior economist had directed his attention, frustrate judicial review? (Camp v. Pitts 411 US 138 [1973])

II.

Do not the following facts collectively evince branch banking in fact, if not in form: (a) the national bank in question is controlled by the shareholders of two other national banks; (b) the national bank in question constitutes an affiliate under 12 U.S.C.A. 221 (a) (b) (2); and, (c) the national bank in question has a president, vice president and three directors in common with the other two national banks?

III.

Should not the Court of Appeals have construed the federal statutory definition of a "branch bank" set forth in 12 U.S.C.A. 36 (f)?

IV.

Although it was unnecessary for the comptroller to make findings of fact, was it not necessary for his decision to have sufficient content to preclude the frustration of judicial review?

STATUTES INVOLVED

The statutory provisions involved are 5 U.S.C. A. Sec. 706; 12 U.S.C.A. 36 (c); 12 U.S.C.A. 36 (f); 221.04 (1) (j) Wis. Stats.; 12 U.S.C.A. 221 (a) (b) (2); 12 U.S.C.A. 1817 (j) (1); and 12 U.S.C.A. 1841 (a) (1) (2) (b) (1) (2). These are printed in Appendix pp. 101 to 106, infra.

STATEMENT

On May 17, 1970, most of the individual defendants herein filed an application for authority to organize a new national bank under the name of Tri City National Bank of West Allis, to be located in the City of West Allis, Wisconsin. A hearing was held by Mr. Donald B. Smith, the Regional Administrator, at Minneapolis, Minnesota, on July 17, 1970, at which hearing all testimony both in favor and in opposition to the granting of the application was taken.

On September 22, 1970, the Comptroller (concurring in the recommendation of the Deputy Comptroller [AF-23]) denied this application "until such time as the Tri City National Banks of Hales Corners and Oak Creek had established their base."

On August 18, 1971, the Comptroller refused to reopen the 1970 case on the ground that he was not able to find a basis at that time for such action. (AF-1)

On March 20, 1973, substantially the same parties filed a "new" application for authority to organize a national bank under the name of Tri City National Bank of West Allis at the same location as set forth in the application of 1970. A

hearing was had before Mr. Donald B. Smith, the Regional Administrator at Minneapolis, Minnesota, on June 8, 1974, at which hearing all testimony in favor of and in opposition to the application was taken. The Comptroller (contrary to the recommendation of the Deputy Comptroller [AF 12-13]) on July 25, 1973, approved the application stating:

> "The banking organizers appear to have done a commendable job in the organization, development and management of two other national banks in the Greater Milwaukee Area.
>
> While there are a number of banks in the general vicinity of the proposed bank, the institutions in the immediate trade area are state-chartered institutions.
>
> The entry of a well-organized National Bank should offer some useful competition and thus contribute to serving the convenience and needs of the public in the West Allis Area.
>
> I conclude that the application (on reconsideration) should be approved." (AF 14)

It is undisputed that three banks located in West Allis, Wisconsin were operating at the time of the application involved in this case. Under Wisconsin Statutes, Sec. 221.04 (1) (j), a branch bank cannot legally be established in West Allis. The president of the proposed Tri City National Bank of West Allis is also the president of the Tri City National Banks of Oak Creek and the Tri City National Bank of Hales Corners. The vice president of the Tri City National Bank of West Allis is

also the vice president of the Tri City National Bank of Oak Creek and the Tri City National Bank of Hales Corners. Three of the directors of the proposed Tri City National Bank of West Allis are also directors of the Tri City National Bank of Oak Creek and the Tri City National Bank of Hales Corners.

The Court of Appeals stated in its footnote 2:

> "Plaintiff does not contend that the explanation was inadequate because the comptroller did not discuss the branch-bank issue, or that the Comptroller failed to consider the issue."

Apparently, this footnote is based on the fact that plaintiff in its brief, filed with the Court of Appeals stated:

"Moreover, the Comptroller was well aware of the problem relating to the Wisconsin branch banking laws as evinced by the statement of his senior economist, shortened in part as follows:

'... With a more accomodating branching code, this site would be excellent for a branch. Under the circumstances, an affiliate relationship such as proposed here is an acceptable alternative. Its competitive and convenience and needs benefits to the public are positive, and in my opinion, it would not materially erode the survival prospects of any existing financial institution.' (Emphasis supplied)

This statement in and of itself evidences an attempt to circumvent the Wisconsin branch banking law."

However, the "terse explanation" of the comptroller did not discuss the "branching code" referred to by his senior economist. Hence, there is no evidence that he considered it.

REASONS FOR GRANTING WRIT

I.

The failure of the comptroller to make a contemporaneous explanation of the determinative reasons for his action and discuss or indicate that he had considered the "branch bank" issue to which his senior economist had directed his attention frustrates judicial review.

II.

The Court of Appeals did not reach the issue of whether or not the facts in this case either singly or collectively established the basis for a finding that branch banking was taking place. This Court in First National Bank in Plant City v. Dickinson 396 US 122 held that 12 U.S.C.A. 36 (c) subjects national banks to state restrictions on the location of branches and that 12 U.S.C.A. 36 (f) determines what a "branch" is, saying in respect to this section, which was called to the Courts attention on petition for re-hearing:

> "Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term 'branch'; by use of the word 'include' the definition suggest a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes any place for receiving deposits

or paying checks or lending money apart from the chartered premises; it may include more. It should be emphasized that, since sec. 36 (f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that 'branch' bankin, is taking place. Thus not only the taking of deposits but also the paying of checks or the lending of money could equally well provide the basis for such a finding." (Emphasis supplied)

Both the Court below as well as the Circuit Court of Appeals held that the case of Camden Trust Co. v. Gidney 301 F (2) 521 (C.A.D.C.) was controlling. In this regard, it will be noted that in that case, the court did not attempt to construe the provisions of 12 U.S.C.A. 36 (f) defining a "Branch" and the case was not decided by a unanimous court. We quote from the dissenting opinion of Judge Bastian:

"The facts in this case show that the transaction herein involved a 'new' bank charter and is, in substance, a subterfuge to obtain a forbidden branch facility. These facts, fully known to the Comptroller, imposed a statutory duty on him to reject the application upon the familiar general principal that form will be disregarded whenever necessary to prevent evasion of the clear purpose of the Statutes."

III.

The Court of Appeals had the power to construe the statutory definition of a "branch bank" set forth in 12 U.S.C.A. 36 (f) and to determine the issue as to whether or not the facts in this case

either singly or collectively formed the basis for a finding that "branch banking" was being carried on within the meaning of this statutory definition. This issue was not determined by the Court. As this issue concerns the construction and application of the National Bank Act in so far as it pertains to "branch banking", it is appropriate for this Court to grant certiorari and to determine on the merits the issues presented and to formulate the necessary guidelines in this area. Schlagenhauf v. Holder 379 US 104.

IV.

This Court has never construed 12 U.S.C.A. 36 (f) defining branch banking in connection with the facts presented in this case. There is a strong public interest requiring such construction for the stability of banks generally and for the preservation of the dual banking system?

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE G. WICKERT
HAROLD H. FUHRMAN
JOHN P. ROEMER

Attorneys for Petitioner

Of Counsel:

WICKERT & FUHRMAN
4455 West Bradley Road
Milwaukee, Wisconsin 53223

Dated at Milwaukee, Wisconsin, this 8th day of July, 1976.

APPENDIX

APPENDIX A

STATUTORY PROVISIONS

5 U.S.C.A.

Sec. 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557

of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

12 U.S.C.A. 36(c)

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting, such authority affirmatively and not merely by implication or recognition; and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C.A. 36(f)

"The term 'branch' as used in this section shall be held to include any branch bank,

branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

221.04(1)(j) Wis. Stats.

(1) Upon the execution and filing of the articles of incorporation with the commissioner of banking and the approval by the commissioner, and upon the filing of an approved copy of such articles with the register of deeds of the county in which the bank is to be located, the bank shall become a body corporate and in addition to the power conferred by the general corporations law, subject to the restrictions and limitations contained in this section, having the following powers:

(j) To establish and maintain a branch bank, upon approval by the commissioner and the banking review board, in a municipality other than that in which the home bank is located, if such municipality has no bank or branch bank at the time of application and if no bank or branch bank is located within a radius of 3 miles from the proposed site of the branch; however such 3-mile limitation shall be computed by measuring the street or road mileage of that route which the commissioner and board find would be ordinarily and customarily traveled as the shortest distance

between such bank or branch banks and the proposed site of the branch. A branch bank established under this paragraph shall be located in the same county in which the home bank is located or in a contiguous county if the location of such branch bank is no more than 25 miles from the home bank. Such branch banks shall be subject to all laws, rules and regulations applicable to banks generally. Application for the establishment of a branch bank under this paragraph shall be made to the commissioner on a form furnished by him.

12 U.S.C.A. 221 (a)(b)(2)

Sec. 221. Definitions

(a) The terms "banks", "National bank", "national banking association", "member bank", "board", "district", and "reserve bank" shall have the meanings assigned to them in Section 221 of this chapter.

(b) Except where otherwise specifically provided, the term "affiliate" shall include any corporation, business trust association, or other similar organization ---

(2) Of which control is held directly or indirectly, through stock ownership or in any other manner by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election

of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank;---

12 U.S.C.A. 1817 (j)(1)

(j)(1) Whenever a change occurs in the outstanding voting stock of any insured bank which will result in control or in a change in the control of the bank, the president or other chief executive officer of such bank shall promptly report such facts to the appropriate Federal banking agency upon obtaining knowledge of such change. As used in this subsection, the term "control" means the power to directly or indirectly direct or cause the direction of the management or policies of the bank. A change in ownership of voting stock which would result in direct or indirect ownership by a stockholder or an affiliated group of stockholders of less than 10 percent of the outstanding voting stock shall not be considered a change of control. If there is any doubt as to whether a change in the outstanding voting stock is sufficient to result in control thereof or to effect a change in the control thereof, such doubt shall be resolved in favor of reporting the facts to the appropriate Federal banking agency.

12 U.S.C.A. 1841 (a)(1)(2)(b)(1)(2)

(a) "Bank holding company" means any company (1) that directly or indirectly owns,

controls, or holds with power to vote 25 per centum or more of the voting shares of each of two or more banks or of a company that is or becomes a bank holding company by virtue of this chapter or (2) that controls in any manner the election of a majority of the directors of each of two or more banks; and, for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. ------

(b) "Company" means any corporation, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include (1) any corporation the majority of the shares which are owned by the United States or by any State, or (2) any partnership.

Exhibit 1

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1924

CENTRAL BANK, a Wisconsin banking corporation,

Plaintiff-Appellant,

v.

JAMES E. SMITH, Comptroller of the Currency, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin—No. 73 C 576
MYRON L. GORDON, *Judge.*

ARGUED FEBRUARY 18, 1976 — DECIDED MARCH 17, 1976

Before SWYGERT, TONE and BAUER, *Circuit Judges.*

PER CURIAM. Plaintiff challenges the issuance by the Comptroller of the Currency of a banking charter to the Tri City National Bank of West Allis. The District Court rejected plaintiff's arguments that the operation of the subject bank violates federal and state branch banking laws and that judicial review is frustrated by the inadequacy of the Comptroller's statement of the reasons for his action. *Central Bank* v. *Smith*, 398 F. Supp. 1403 (E.D. Wis. 1975). We affirm.

In 1970, an application by the same organizers for the same location was rejected by the Comptroller on the

ground that he believed they should devote their efforts to developing two other relatively new banks in which they had substantial interests. These banks, the Tri City National Banks of Hales Corner and Oak Creek, then had deposits of $581,000 and $5,700,000, respectively. By 1973, when the organizers filed their second West Allis application, those deposits had risen to $5,000,000 and $12,000,000. The second application was approved, and the West Allis bank began operations. The District Court's denial of a preliminary injunction against its operation was affirmed by this court's order in an earlier appeal.

Over one-half the shares of the West Allis bank are owned by shareholders of the Hales Corner and Oak Creek banks. Consequently, the new bank is an affiliate of the existing banks, 12 U.S.C. § 221a(b) (2), and subject to special regulations. For instance, loans between affiliates must comply with restrictions on amount and must have collateral. 12 U.S.C. § 371c. Besides having common stockholders, the Tri City banks have interlocking directorates and managements. The president of the West Allis bank, a vice president, and two of the seven directors, hold the same offices at the other two banks. According to the Deputy Regional Administrator,, however, "[a]ctive management of day to day operations will be provided by Executive Vice President and Cashier J. Schaefer." [1973 File at 25.] We are not told that Schaefer holds any position at the other two banks.

On the basis of these facts, plaintiff argues that the West Allis bank is a branch of the other two banks. Although 12 U.S.C. § 36 subjects national banks to state restrictions on the location of branches, federal law determines what is a branch. *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122, 133-134 (1969). A branch relationship may exist even between two separate corporate entities if a "unitary operation" is intended, that is, if one bank is to be an instrumentality of the other or if the two are to be operated as one. *Independent Bank of Georgia* v. *Board of Governors of Federal Reserve System,* 516 F.2d 1206, 1223-1224 (D.C. Cir. 1975); *First National Bank in Billings* v. *First Bank Stock Corp.,* 306 F.2d 937, 942 (9th Cir. 1962). On the other hand,

"it is not enough to show that common control through stock ownership by [the parent bank], which participates actively in the management of its subsidiaries, produces cooperation or even eliminates competition between the subsidiaries." *Id.*

Plaintiff's argument is based on *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.,* 323 F.2d 290 (D.C. Cir. 1963), *reversed on other grounds,* 379 U.S. 411 (1965). In *Whitney* and a more recent case, *Independent Bank of Georgia, supra,* the District of Columbia Circuit has found either branch banking (*Whitney*) or "a strong facial probability of a 'unitary operation'," *Independent Bank of Georgia, supra,* 516 F.2d at 1223. In both of those cases, unlike the present case, there was direct evidence that the subsidiaries were to be integral parts of a unified banking operation. In *Whitney,* the entire arrangement was said by management to be "part of an overall plan for the operation . . . of the Whitney organization" and "a method of pooling all of the deposits of our customers and of our capital funds." 323 F.2d at 303, 304. In *Independent Bank of Georgia,* a substantial part of the parent's mortgage activity was to be transferred to a subsidiary specializing in mortgages. 516 F.2d at 1223.

A more fundamental distinction is that these cases deal with holding companies rather than affiliates. By use of a holding company, a parent bank can exercise permanent (see *Whitney National Bank* v. *Bank of New Orleans, supra,* 323 F.2d at 304) and total control over the subsidiary, through its control of voting stock. *Independent Bank of Georgia* v. *Board of Governors of Federal Reserve System, supra,* 516 F.2d at 1223. In contrast, shareholders of existing affiliates can control a new bank only if they vote as a block, and even then their control is incomplete. For instance, the cumulative voting required by 12 U.S.C. § 61 (1975 Supp.) guarantees minority representation on the board of directors.

We agree with the District Court that the controlling case is *Camden Trust Co.* v. *Gidney,* 301 F.2d 521 (D.C. Cir. 1962), *cert. denied,* 369 U.S. 866. In that case the directors of an existing bank attempted to organize a

new bank, which was to be an affiliate of the existing bank. 301 F.2d at 522, 523 n. 7. It was expected that the new bank's affairs would be "conducted by the same management and under the same policies" as the existing bank. *Id.* The court held that the new bank would not be a branch of the existing bank. *Camden Trust* is in line with more recent cases which have also rejected branch-bank attacks on affiliates. *American Bank of Tulsa* v. *Watson*, 391 F.Supp. 573, 576 (N.D. Okla. 1973), *aff'd*, 503 F.2d 785, 786, 789 (8th Cir. 1974);[1] *Pineland State Bank* v. *Proposed First National Bank of Bricktown*, 335 F.Supp. 1376, 1380 (D. N.J. 1971).

The fact that here the names of the affiliates are similar does not serve to distinguish *Camden Trust*. *Cf. Whitney National Bank* v. *Bank of New Orleans*, *supra*, 323 F.2d at 304. The similarity of names does not establish an intent to engage in a unitary operation; the name of the West Allis bank was chosen by the Comptroller from a list submitted by the organizers. We conclude that the West Allis bank is not a branch of its affiliates.

The plaintiff's second argument, based on *Camps* v. *Pitts*, 411 U.S. 138 (1973), is that judicial review is frustrated by the Comptroller's inadequate explanation of his decision. In *Camps*, the Comptroller rejected an application because of "the need factor." The Court of Appeals was unable to determine what this term meant or what specific factors the Comptroller considered. 463 F.2d 632, 634 (4th Cir. 1972). In the Supreme Court the Comptroller challenged only the form of relief granted by the Court of Appeals, remand for a trial de novo. The Supreme Court held that the proper relief was to obtain a further explanation from the agency through affidavits or testimony. *Camp* v. *Pitts*, *supra*, 411 U.S. at 143. The Court cautioned that the Comptroller's action "must stand or fall" with the "determinative reason" underlying the explanation already given. Nothing in *Camp* supports the plaintiff's view that the Comptroller's action

[1] The mandate of affirmance in *American Bank of Tulsa* was stayed to allow a holding company issue to be presented to the Federal Reserve Board. 503 F.2d at 789. The government informs us that an order of affirmance was subsequently entered on March 12, 1975.

must be vacated as arbitrary and capricious when the Comptroller's explanation is vague or unclear.

Moreover, we do not find the explanation the Comptroller has already given so vague or inadequate as to frustrate judicial review and require clarification. The Comptroller's explanation of his approval of the 1973 application is as follows:

> "The banking organizers appear to have done a commendable job in the organization, development and management of two other national banks in the Greater Milwaukee Area.
>
> "While there are a number of banks in the general vicinity of the proposed bank, the institutions in the immediate trade area are state-chartered institutions.
>
> "The entry of a well-managed national bank should offer some useful competition and thus contribute to serving the convenience & needs of the public in the West Allis area.
>
> "I conclude that the application (on reconsideration) should be approved."

Plaintiff complains that the Comptroller did not say whether his decision was based on the 1970 administrative record or the 1973 administrative record. The Comptroller's language indicates, however, that he did consider the 1973 record. The first sentence of his explanation refers to the organizers' success in managing the two existing banks, one of which had barely opened in 1970, and the second sentence speaks in the present tense of banking conditions in the area. We reject the contention that the Comptroller may simply have reconsidered the 1970 record.

Although the Comptroller's explanation is terse, plaintiff has not shown that it is unsupported by the 1973 record or that there are seriously contested, significant issues the Comptroller did not address.[2] Consequently, the District Court was correct in upholding the Comptroller's decision without requesting further clarification.

[2] Plaintiff does not contend that the explanation was inadequate because the Comptroller did not discuss the branch-bank issue, or that the Comptroller failed to consider the issue.

City National Bank v. *Smith*, 513 F.2d 479, 480, 484 (D.C. Cir. 1975).

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT NO. 2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

THE CENTRAL BANK,

Plaintiff,

v. No. 73-C-576

JAMES E. SMITH, Comptroller, et al,

Defendants.

DECISION AND ORDER

There are several motions before the court. The defendant Smith has moved for judgment on the pleadings on the grounds of lack of jurisdiction or alternatively for summary judgment. The other individual defendants have joined in Mr. Smith's motion. The plaintiff, Central Bank, has also moved for summary judgment, contending that that there is no material issue of fact for trial, and that it is entitled to judgment as a matter of law. The court has before it the comptroller's administrative records on the relevant charter applications.

The Tri City National Bank of West Allis has moved for leave to intervene as a defendant and has submitted a proposed answer to the second amended complaint. The plaintiff has also filed a motion for leave to serve a request for

the production of certain documents which would enable its counsel to inspect the stock registers of the Tri City National Bank of West Allis, Tri City National Bank of Hales Corners and the Tri City National Bank of Oak Creek. The request for leave to make such inspection is necessary because on April 1, 1974, this court granted the comptroller's motion quashing discovery. At the time of such order, the court did not have before it the comprehensive administrative record in this case. Such record has now been made available to the court for review. An examination of the record persuades me that the defendants' motion for summary judgment must be granted, and therefore it will be unnecessary for this court to resolve either the application for intervention or the motion for leave to conduct discovery.

The origins of this action are summarized in an unpublished memorandum of the court of appeals dated February 20, 1975:

> "On March 20, 1973, defendants applied to the Comptroller for permission to organize a new national banking association to be known as Tri City National Bank of West Allis. This application followed an earlier one, filed April 17, 1970, which had been denied on the ground that existing affiliated banks have not yet adequately established their base. Plaintiff contested both applications and was granted a hearing in both instances. On July 25, 1973, the Comptroller, contrary to the recommendation of the Deputy Comptroller, approved defendants' renewed application. In November 1973, the plaintiff

filed a complaint in the district court against the Comptroller and the individaul organizers of the proposed bank seeking declaratory and injunctive relief. Plaintiff alleged that there exists common ownership, management and control between two existing banks and the Tri City National Bank of West Allis. The result, plaintiff contended, is that the Tri City National Bank of West Allis is a branch bank in violation of Wisconsin law. Defendants argued, however, that the proposed bank is an 'affiliated bank' and that its existence does not violate relevant state branch banking statutes. See 12 U.S.C. Sec. 161(c), 221a (b), 371c, and 481; Wis. Stats. Ann. Sec. 221.04(j)."

In reviewing the conclusions of the comptroller, the scope of the court's review has been clearly described by the United States Supreme Court in Camp v. Pitts, 411 U.S. 141 (1973). There the Court said:

> "[T]he proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record, 5 U.S.C. Sec. 706 (2) (E). Nor was the reviewing court free to hold a de novo hearing under Sec. 706 (2) (F) and thereafter determine whether the agency action was 'unwarranted by the facts.'"...
>
> "The appropriate standard for review was, accordingly, whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in

> accordance with law,' as specified in 5 U.S.C. Sec. 706 (2) (A). In applying that standard, the focal point for judicial review should be the administrative record made initially in the reviewing court."

In my opinion, the record made in this case amply demonstrates that the comptroller investigated the various facets of the application for the new bank with care and rendered an adjudication which cannot be denominated as arbitrary, capricious or an abuse of discretion. Contrary to the plaintiff's allegations, there would appear to be no merit to the contention that due process was short circuited; on the contrary, full and adequate hearings, with notice, were afforded. No useful purpose would be served by this court's analyzing the many details which culminated in the comptroller's administrative approval of the new bank; suffice it to say that the record amply shows that extensive field investigations were held; that public hearings were conducted; that the entire file was carefully analyzed by the comptroller and his staff; and that the final disposition by the comptroller was warranted and reasonable.

I find no merit to the plaintiff's contention that overlapping stock ownership constitutes branch banking and necessitates an upsetting of the comptroller's conclusions. Camdan Trust Co. v. Gidney, 301 F.2d 521, 525 (D.C. Cir. 1962), cert. denied 369 U.S. 886 (1962).

Therefore, IT IS ORDERED that the defendants' motion for summary judgment be and hereby is granted.

IT IS ALSO ORDERED that the plaintiff's motion for summary judgment be and hereby is denied.

IT IS FURTHER ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 31st day of July, 1975.

/s/ Myron L. Gordon
U.S. District Judge

EXHIBIT NO. 3

Per Curiam Opinion

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 17, 1976

BEFORE

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

No. 75-1924

CENTRAL BANK, a Wisconsin
banking corporation,

Plaintiff-Appellant,

vs.

JAMES E. SMITH, Comptroller
of the Currency, et al.,

Defendants-Appellees.

Appeal from the United States
District Court for the Eastern
District of Wisconsin.
No. 73 C 576
Myron L. Gordon, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed on this date.

United States Court of Appeals

For the Seventh Circuit

No. 75-1924

CENTRAL BANK,
a Wisconsin Banking Corporation,

Plaintiff-Appellant,

-vs-

JAMES E. SMITH, COMPTROLLER
OF THE CURRENCY, et al.

Defendants-Appellees.

Appeal From The United States District Court For
The Eastern District of Wisconsin
Honorable Judge Myron L. Gordon
Judge Presiding

PETITION FOR RE-HEARING, SUGGESTION OF
RE-HEARING IN BANC AND ARGUMENT

PETITION FOR RE-HEARING

The plaintiff-appellant represents to the Court that on March 17, 1976, it filed its opinion and entered judgment in accordance therewith, affirming the decision of the District Court of the Eastern District of Wisconsin, respectfully petitions this Court for a Re-Hearing for the following reasons:

A. Failure of the Court to consider 12 USC 36 (f), cited by plaintiff-appellant in its reply to the brief of the comptroller.

B. Misapprehension as to the effect of 12 USC 371 (a) (b) (2) defining an affiliate in connection with 12 USC 36 (f).

SUGGESTION FOR ALLOWANCE FOR AN IN BANC HEARING

The plaintiff-appellant respectfully represents that the issues involved in this case requires the judicial construction of national banking laws and the circumstances are appropriate for an in banc re-hearing, and suggest that such be allowed.

ARGUMENT

A. This court, on the basis of First National Bank of Plant vs. Dickinson, 396 US 36, 121, 133-134 (1969) recognized that national banks in respect to location, are subject to state limitations, 12 USC 36 (c), and Federal laws determine what is a branch, 12 USC 36 (f).

The Court has failed to consider 12 USC 36 (f) as it relates to the definition of a branch bank for the purpose of determining the scope of branch

banking available to a National Bank in a State that prohibits branches for State Banks. (Dickinson, supra)

B. It should be pointed out at the outset that affiliate banks are those which fall within the definition of 12 USC 221 (a) (b) (2); based upon the fact that over one-half of the shares of the West Allis Bank are owned by the shareholders of the Hales Corners and Oak Creek Banks,the West Allis Bank is an affiliate of these banks, 12 USC 221 (a) (b) (2). The Court held the status of Tri City National Bank of West Allis to be that of an affiliate of the other existing Tri City National Banks.

The affiliation of banks may be legal or illegal, depending upon the circumstances. If this affiliation is in violation of an anti-trust statute, it is illegal; if this affiliation is in violation of 12 USC 36 (c), or any other applicable statute, such affiliation is illegal.

In holding that the Tri City National Bank of West Allis is an affiliate of the Tri City National Banks of Hales Corners and Oak Creek, the Court recognizes that the majority control of Tri City National of West Allis is held by the stockholders of the other existing Tri City National Banks. Majority control will continue so long as the affiliate - status is maintained; the fact that 12 USC 61 (1975 supp.) referred to in the opinion, guarantees minority representation on the Board of Directors does not effect the majority control, but merely guarantees minority representation on the Board of Directors.

In addition to this control, the Court also recognizes the existence of an interlocking

presidency, vice-presidency and directors, who as such, formulate bank policies in respect to the Tri City National Bank of West Allis. The fact that the every day affairs of the bank are conducted by an executive vice-president not involved with such formulation but charged only with the duty of executing such policies, does not mean the absence of such majority control.

The court has left unresolved the question of whether the majority control of Tri City National Bank of West Allis, by the stockholders of the Tri City National Banks of Hales Corners and Oak Creek, and the interlocking officers and directors singly or together fall within the ambit of 12 USC 36 (f).

The facts of this case establish a basis for a finding that branch banking is taking place under the federal definition of branch banking and First National Bank vs. Dickinson, (supra).

Respectfully submitted,

LAWRENCE G. WICKERT
HAROLD H. FUHRMAN
JOHN P. ROEMER

Attorneys for Plaintiff-Appellant,
CENTRAL BANK, a Wisconsin Banking Corporation

Of Counsel:

WICKERT & FUHRMAN
4455 West Bradley Road
Milwaukee, Wisconsin 53223

EXHIBIT NO. 5

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 23, 1976

BEFORE

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

No. 75-1924

THE CENTRAL BANK, a
Wisconsin Banking
Corporation,

Plaintiff-Appellant,

vs.

JAMES E. SMITH, COMP-
TROLLER OF THE CURRENCY
OF THE UNITED STATES, et
al.,

Defendants-Appellees.

Appeal from the United States
District Court for the Eastern
District of Wisconsin.
(73 C 576)

On consideration of the petition for rehearing and suggestion that it be reheard in banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

No. 76-55

In the Supreme Court of the United States

OCTOBER TERM, 1976

CENTRAL BANK, PETITIONER

v.

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-55

CENTRAL BANK, PETITIONER

v.

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

Petitioner seeks review of a decision upholding the issuance by the Comptroller of the Currency of a banking charter to the Tri City National Bank of West Allis.

The application to charter the new bank, to be located in West Allis, Wisconsin, was approved by the Comptroller in 1973 (Pet. App. 114). In 1970 the Comptroller had disapproved an application by some of the same parties to charter a bank in the same location (Pet. App. 107-108). Both applications proposed the establishment of a new national bank, to be affiliated by stock ownership with Tri City National Bank of Oak Creek and Tri City National Bank of Hales Corners (*id.* at 108). The 1970 application had been denied because the latter banks had not adequately established their base (Pet. App. 114). However, both banks had grown rapidly since 1970 (Pet. App. 108).

The 1973 application proposed (1) that stock of the new bank be offered on a pro rata basis to existing individual stockholders of the two existing banks in order to insure affiliation as required by the National Bank Act, 12 U.S.C. 221a; (2) that no individual or his interests would hold more than 5% of the stock of the new bank, but at least 50% of the shareholders of the existing banks would own stock in the new bank; and (3) that the balance of the stock would be offered to local and area businessmen and individuals (C.A. App. 27a).

Petitioner contested both applications at the administrative level, and each time was granted a hearing. In 1973, the Comptroller determined, upon the basis of an extensive administrative record, that the new bank should be approved. He noted briefly (C.A. App. 19a):

> The banking organizers appear to have done a commendable job in the organization, development and management of two other national banks in the Greater Milwaukee Area.
>
> While there are a number of banks in the general vicinity of the proposed bank, the institutions in the immediate trade area are state-chartered institutions.
>
> The entry of a well-managed national bank should offer some useful competition and thus contribute to serving the convenience & needs of the public in the West Allis area.
>
> I conclude that the application (on reconsideration) should be approved.

Petitioner then brought this action in the United States District Court for the Eastern District of Wisconsin, requesting declaratory and injunctive relief. The district

court granted defendants'[1] motion for summary judgment (Pet. App. 113-117). The court of appeals affirmed in a *per curiam* opinion upon which we rely (Pet. App. 107-112).[2]

1. Petitioner contends that the court of appeals "did not reach the issue" whether the new bank in this case was a branch and "never construed" the federal statutory definition of branch banking (Pet. 7, 9). The court of appeals, however, reached and correctly resolved these issues (Pet. App. 108-110). Following *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, the court of appeals first examined federal law to determine whether or not the new bank in this case was a "branch" of its affiliate banks. The court correctly distinguished cases dealing with holding companies rather than affiliates, on the ground that a holding company, unlike a mere affiliate, can exercise permanent and total control over the subsidiary. The court also noted that in those cases finding holding company subsidiaries to be branches, "there was direct evidence that the subsidiaries were to be integral parts of a unified banking operation" (Pet. App. 109). The court then relied on a consistent line of federal cases[3] to conclude that "the West Allis bank is not

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[1]The defendants were the Comptroller of the Currency and the individual organizers of the proposed bank.

[2]The case was previously before the Seventh Circuit on an appeal from the district court's denial of a stay *pendente lite*. The court of appeals affirmed that denial on February 20, 1975.

[3]*Camden Trust Co.* v. *Gidney*, 301 F. 2d 521 (C.A. D.C.), certiorari denied, 369 U.S. 886; *American Bank of Tulsa* v. *Watson*, 391 F. Supp. 573 (N.D. Okla.) (mandate of affirmance stayed on other grounds *sub nom. American Bank of Tulsa* v. *Smith*, 503 F. 2d 784 (C.A. 10), subsequently affirmed, March 12, 1975); *Pineland State Bank* v. *Proposed First National Bank of Bricktown*, 335 F. Supp. 1376 (D. N.J.)).

a branch of its affiliates" (Pet. App. 110). These cases hold that a new bank which is affiliated with an existing bank is not a branch of the existing bank, even if the new bank's affairs would be "conducted by the same management and under the same policies" as the existing bank. *Camden Trust Co.* v. *Gidney*, 301 F. 2d 521, 522, 523 n. 7 (C.A.D.C.), certiorari denied, 369 U.S. 886. The decision of the court of appeals in this regard is correct and does not warrant review by this Court.

2. The court of appeals was also correct in concluding (Pet. App. 110-112) that the Comptroller's decision did not frustrate judicial review. Under *Camp* v. *Pitts*, 411 U.S. 138, where the administrative record indicates the reasons for final agency action, even the absence of any specific findings by the Comptroller does not result in "such paucity of administrative explanation as would frustrate effective judicial review of the Comptroller's action." *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F. 2d 284, 288 (C.A. 5), certiorari denied, 416 U.S. 905; see also *City National Bank* v. *Smith*, 513 F. 2d 479, 484-485 (C A. D.C.). Here the Comptroller, after an extensive field investigation and public hearings (Pet. App. 116), noted the favorable record of the bank organizers in developing the affiliated banks and pointed out that introduction of a national bank " 'should offer some useful competition and thus contribute to serving the convenience & needs of the public in the West Allis area' " (Pet. App. 111).[4] This was a sufficient explanation of the

[4]Petitioner contends in this regard that the Comptroller failed to indicate that he considered whether the new bank would be a branch of the two affiliate banks (Pet. 7). As the court of appeals noted (Pet. App. 111, n. 2), this issue was not raised in the courts below (see Pet. 6). The contention is therefore not properly before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

basis of the Comptroller's decision to permit meaningful judicial review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-55

CENTRAL BANK, PETITIONER

v.

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER IN REPLY TO THE MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

LAWRENCE G. WICKERT
HAROLD H. FUHRMAN
JOHN P. ROEMER

Attorneys for Petitioner,
CENTRAL BANK

4455 West Bradley Road
Milwaukee, Wisconsin 53223

IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF OF PETITIONER IN REPLY TO THE MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

As its brief in reply to the Memorandum for the Comptroller of the Currency in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals.

1. The Petitioner adopts and incorporates herein as though fully set forth at length, its Petition for Re-hearing filed with the Circuit Court of Appeals and printed in full as petitioner's Exhibit No. 4, Appendix Page 120 of the petition.

2. The Court's attention is invited to the fact that in Camden Trust Co. v. Gidney CCDC, 301 F(2) 521, the Circuit Court for the District of Columbia, based entirely on the facts presented in that case held that Haddenfield National Bank had acquired an affiliate status only and not the status of a branch.

The Court's attention is further invited to Whitney National Bank v. Bank of New Orleans, 323 F(2) 290, wherein the same court, based on the facts presented in that case, distinguished its prior decision in Camden, holding that Whitney National Bank in Jefferson Parish had acquired a branch status, although it was an affiliate in form.

It will be observed that in neither of these cases has the Circuit Court of Appeals given consideration to the provisions of 12 U. S. C. A. 36(f) Each has been decided on the facts presented in the respective cases without reference to the federal definition of a "branch".

3. It is submitted that this Court should grant certiorari and establish the necessary guidelines for the purpose of enabling courts to determine on a factual basis the factors to be considered in determining when an affiliate becomes a branch in fact under 12 U. S. C. A. 36(f), containing the federal statutory definition of a branch.

4. It is further submitted that under the Administrative Procedure Act, 5 U. S. C. A. 706, the reviewing court must decide all relevant questions of law, interpret constitutional and statutory provisions and hold unlawful and set aside

any agency action which is in excess of statutory jurisdiction, authority or limitations, or short of statutory right. This constitutes a congressional mandate to the court to review the legality of the agency action, regardless of when and where an issue of legality is raised. In fact, the district court conceded that the branch banking issue was properly before that court. Likewise, it is properly before this court.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

LAWRENCE G. WICKERT
HAROLD H. FUHRMAN
JOHN P. ROEMER

Attorneys for Petitioner,
CENTRAL BANK

P. O. ADDRESS:

4455 West Bradley Road
Milwaukee, Wisconsin 53223